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No. 01-592

IN THE
Supreme Court of the United States

CALIFORNIA FEDERAL BANK, FSB,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its brief in opposition, the government attempts to portray the decision below as nothing other than the routine application of settled law to the facts of this case. *See, e.g.*, Opp. 14. In reality, however, the Federal Circuit announced novel rules governing contract remedies against the government that conflict with this Court's precedents, the *Restatement (Second) of Contracts*, and the decisions of other courts of appeals. This Court's immediate review is warranted in light of the magnitude of the errors below and the importance of these remedial issues not only to this case but also to the 120-plus cases pending in the wake of this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

1. The government's principal argument is that this Court need not review the Federal Circuit's decision on restitution and replacement costs at this time because the case has been remanded for a trial on CalFed's claim for lost profits. Opp. 11-14. In the circumstances of this case, however, the Court's general prudential rule against reviewing interlocutory decisions of federal courts is inapplicable.

a. First, this case has been specifically designated a "test" case for resolving legal issues common to many of the *Winstar*-related cases. Pet. 1-2. Resolution of CalFed's lost profits trial and the inevitable appeal will take substantial time, possibly years. In the meantime, many of the follow-on cases will proceed to trial under the erroneous legal principles announced by the Federal Circuit in this case. Immediate review of the decision below would settle the availability of restitution in many of the remaining *Winstar*-related cases.

The broad precedential effect of the Federal Circuit's determination also counsels strongly in favor of granting immediate review. The ruling below conflicts with this Court's decisions in *Winstar* and *Mobil Oil Exploration*

& Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000), by creating special contract rules for the government. It also conflicts with decisions of the Ninth and Tenth Circuits and cannot be reconciled with fundamental principles of restitution as set forth in the *Restatement*. The danger posed by a wrongly decided "test" case that will guide the decisions in scores of pending cases involving billions of dollars is substantial and warrants this Court's immediate review.

b. Moreover, this Court has routinely granted certiorari in cases where the court of appeals has remanded the matter for further proceedings. Immediate review of an interlocutory ruling is particularly appropriate where, as here, the question is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Immediate review is also appropriate where, as here, the courts of appeals are in stark conflict and this Court's review is necessary to establish uniformity among the circuits. *See Wilson v. Garcia*, 471 U.S. 261, 266 (1985) ("conflict, confusion, and uncertainty" in the lower courts "provide[ ] compelling reasons for granting certiorari" before final judgment). Indeed, in *Winstar* itself, the Court granted certiorari despite the case's interlocutory posture. *See* 518 U.S. at 859. At issue in *Winstar* were three "test" cases designated by the courts below as to liability. This case, similarly, has been designated a test case as to remedial issues common to many of the *Winstar*-type cases.

c. The government contends, however, that "[i]f CalFed prevails on its claim for lost profits, then its claim for restitution . . . may be rendered entirely moot." Opp. 11. While CalFed has every confidence in its lost-profits claim, the government can be expected to contest it vigorously. More importantly, CalFed is entitled to restitution as an independent alternative to lost profits. *See Acme Process Equip. Co. v. United States*, 347 F.2d 509, 528 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966). Moreover, the government has taken

the position that CalFed cannot recover lost profits after the first quarter of 1994; if the trial court were to accept this contention, CalFed's lost profits would be limited to approximately $280 million—substantially less than its $400 million restitution claim. If this Court were to reverse the Federal Circuit's flawed restitutionary holding, CalFed would be entitled to recover the higher of either a restitutionary award or lost profits.

d. The government argues that the Federal Circuit "only held that CalFed failed to prove that it conferred the benefit it alleged," and contends that the decision below is thus of limited significance. Opp. 13. The government is mistaken. The Federal Circuit held that restitution measured by the net liabilities assumed in supervisory acquisitions is unavailable *as a matter of law* in *Winstar*-related cases. That the court's decision was legal rather than factual in nature is evident from its ruling in *Glendale Federal Bank, FSB v. United States*, 239 F.3d 1374 (Fed. Cir. 2001), which served as the basis for the denial of restitution in this case. Pet. App. 14a ("There is no meaningful difference between the restitution claims in this case and *Glendale*.").

In *Glendale*, the trial court made extensive factual findings that the benefit Glendale conferred on the government was the amount of the net liabilities it assumed.[1] *Without making any determination that those*

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[1] *See* 43 Fed. Cl. 390, 406-07 (1999) ("the value of the benefit conferred by Glendale to the government, at the time the contract was made, is $798.291 million, which is comprised [largely] of the government's contemporaneous calculation of the total loss to FSLIC avoided by the merger . . . ."). Indeed, FHLBB Chairman Richard Pratt recognized at the time that "the solution which FSLIC found is one which appears to save the people of the United States . . . approximately three-quarters of a billion dollars." *See id.* at 406. The Federal Circuit nevertheless concluded as a matter of law that restitution was unavailable.

factual findings were clearly erroneous, the Federal Circuit reversed the trial court and held that, as a matter of law, restitution may not be measured as the amount of net liabilities. 239 F.3d at 1382. The Federal Circuit stated that while it "recognize[d] the appeal in the restitution approach," it "[saw] the question of the proper damages theory somewhat differently" and held that restitution for net liabilities was an improper remedy in cases "like" *Glendale* and *CalFed*. *Id.* at 1376, 1383. In *CalFed*, of course, the trial court rendered the opposite factual conclusion, yet the Federal Circuit reached the same legal conclusion. The *Glendale* decision and the ruling below thus demonstrate that, regardless of the factual findings or the "proof" offered by the plaintiff, the Federal Circuit has determined as a matter of law that restitution in the amount of net liabilities is unavailable in the majority of *Winstar*-related cases. Indeed, the government concedes as much when it states that "restitution may be available in certain *other Winstar*-related cases, based on *different* theories of restitution than those presented here." Opp. 13 (emphases added).[2]

e. Finally, immediate review is warranted to avoid precisely the kind of "piecemeal" litigation decried by the government. At a bare minimum, a remand is appropriate to allow CalFed to introduce evidence specifically tailored to meet the Federal Circuit's new "buying time" formulation of the standard for restitution. Although the government now claims that CalFed was "well aware" of its position that the benefit CalFed provided was the value of time, Opp. 23, the government *never* conceded at trial that the time it bought had any value. CalFed deserves the opportunity to meet a newly minted legal standard that was neither announced in ad-

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[2] Similarly, in a motion filed with the Federal Circuit, the government conceded that "the proper approach to restitution" is a "legal issue[ ]." *See* Motion for Consecutive Oral Arguments Before the Same Panel at 3 (Sept. 3, 1999).

vance by the court nor foreseen by the parties. If this Court were to order such a remand, CalFed and the government could litigate any remaining restitutionary issues at the same time the lost profits claim is tried.

2. The decision below violates this Court's mandate in *Mobil* that "'[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" 530 U.S. at 607 (quoting *Winstar*, 518 U.S. at 895). The government strives to downplay this conflict by mischaracterizing the Federal Circuit's ruling as a straightforward application of contract law.

a. The government contends that CalFed "conflates notions of disgorgement with the distinct remedy of restitution." Opp. 15-16. But disgorgement and restitution are *not* "distinct." In fact, disgorgement of the benefit conferred on the breaching party is *exactly* what is required under the law of restitution: "The court may . . . require the other party to *disgorge the benefit* that he has received by returning it to the party who conferred it. The interest of the claimant protected in this way is called the 'restitution interest.'" *Restatement (Second) of Contracts* § 344, cmt. *a* (emphasis added). Indeed, although recognizing that "a form of disgorgement" would allow CalFed to recover the "immediate benefit" it conferred on the government "measured by the net liabilities assumed by" CalFed, the trial court erroneously denied such relief. Pet. App. 46a-47a. Ordinary principles of contract law dictate that CalFed is entitled to restitution of the benefit it conferred on the government.

b. In rejecting restitution as "ignor[ing] the reality of subsequent events as they impacted on the parties," *Glendale*, 239 F.3d at 1383, the Federal Circuit ignored decades of contrary precedent, including *Mobil*, which held that the benefit conferred upon the breaching party is measured as of the moment of the plaintiff's performance, and that "subsequent events" affecting the value of the benefit are irrelevant as a matter of law. 530 U.S. at

623-24. The government's contorted defense of the Federal Circuit's reasoning—that the court considered subsequent events as a means of determining the value of the benefit at the time of CalFed's performance (Opp. 19-20)—only highlights the error. *Mobil precludes* consideration of post-performance events in calculating the value of a performance. It is no answer to say, as the government does, that consideration of subsequent events is permissible to the extent they may retrospectively illuminate the benefit conferred on the breaching party. *Mobil* holds that a benefit's value be measured *ex ante*, at the time of performance, and that courts may not adjust that value to reflect or incorporate the impact of post-performance events.

Similarly foreclosed by *Mobil* is the Federal Circuit's conclusion that restitution is unavailable as a matter of law because the government might have had options other than inducing CalFed to acquire the failing thrifts. Pet. App. 13a-14a. The government paints the court's legal error as a factual determination. Opp. 21-22. But even assuming *arguendo* the existence of other "options," the Federal Circuit committed *legal* error in adopting a methodology of calculating restitution that runs directly contrary to the approach set forth in the *Restatement* and adopted by this Court in *Mobil*. Those authorities make clear that the amount of restitution is measured by the value of the benefit conferred on the breaching party regardless of any other "options" the breaching party may have had. *See Restatement (Second) of Contracts* § 373(1); *Mobil*, 530 U.S. at 624. In denying restitution in part because of the existence of other purported "options," the Federal Circuit did *not* apply a settled legal standard to the facts, but created a *new* legal standard that conflicts with *Mobil* and effectively eliminates restitution as a remedy in many contract cases against the government.

c. The government repeatedly attempts to portray this case as a factual rather than legal dispute. As noted

above, the suggestion that the Federal Circuit's ruling was factual in nature is refuted by the court's prior decision in *Glendale*, which involved "nearly identical" claims (Pet. App. 13a) and where the court *did not question* the trial court's express factual finding that the benefit actually conferred was the amount of net liabilities—yet determined that restitution was unavailable as a matter of law. 239 F.3d at 1382.

The government argues, however, that CalFed supplied "no proof" regarding the value of the benefit it provided—the value of "buying time," as characterized by the Federal Circuit. Opp. 22. But, as *Glendale* amply illustrates, the decision below did *not* rest on a purported failure of "proof." *See* note 1, *supra*. Moreover, even accepting the legitimacy of the court's "buying time" formulation, the suggestion that there was no proof of the value of the time bought is incorrect. The unrebutted evidence at trial established that each of the acquired institutions was on the brink of default *and* that the government's regulators believed the mergers to be a permanent solution to the government's liability exposure. *See* Pet. 18-19. There is no factual basis for reaching any conclusion other than that the "value of time" conferred upon the government is the value of the net liabilities assumed by CalFed.[3]

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[3] The government claims that "CalFed's acquisition of Southeast and Brentwood did not relieve the government of its potential financial responsibility for the net liabilities of those institutions" and asserts that only a fortuitous decline in interest rates allowed CalFed to survive and avoid a government takeover. Opp. 18. This purported post-contract effect of declining interest rates, however, rests on the speculative trial testimony of the government's expert, Dr. Hamm, who claimed that the net liabilities CalFed acquired in the mergers *could* have been eliminated by the decline in interest rates *only if* CalFed had held all of its assets as they existed on the day of the mergers, then sold them *after* interest rates had remained low for a sufficient while, and *before* rates in-

Because of CalFed's agreement to acquire Southeast and Brentwood, the government *never* had to assume the hundreds of millions of dollars in liabilities of the failing thrifts. The government asserts that the Federal Circuit did not conclude that CalFed conferred a substantial benefit. Opp. 22. Not only did the court below reach this very conclusion, *see* Pet. App. 13a-14a, but it is indisputable that CalFed provided a benefit of *some* value—and yet CalFed (like Glendale) was left with a restitution award of zero.[4]

d. The government's attempt to downplay the conflict between the decision below and the decisions of the Ninth and Tenth Circuits is unavailing. The government seeks to distinguish *Far West Federal Bank v. OTS*, 119 F.3d 1358 (9th Cir. 1997), on the basis that the Ninth Circuit purportedly deemed the government's regulatory alternatives "immaterial in the particular circumstances before it" because there was "'no question that the Investors conferred *some* benefit on the government.'" Opp. 26 (quoting *Far West*, 119 F.3d at 1366). But the same is true here: There is no question that CalFed conferred a benefit on the government, and the Federal Circuit's denial of restitution—based in part on the supposed availability of alternatives—squarely conflicts

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creased again. *See* A1005286-90, A1005292-97. Dr. Hamm's speculation has absolutely no bearing on the amount of the benefit that CalFed *actually* conferred on the government. In fact, it was undisputed that CalFed *did* pay all of the liabilities of the acquired institutions and that the government was never called upon to do so.

[4] The government's argument concerning the amount of the offset of any restitutionary award, Opp. 23-24, is both incorrect and irrelevant. Should this Court grant certiorari and reverse the judgment below, the result would be a remand to the Court of Federal Claims for a calculation of the value of the benefit conferred. At that point, the government can raise its arguments concerning the amount of any offset.

with the Ninth Circuit's conclusion that such alternatives are irrelevant as a matter of law.

The government fares no better in seeking to reconcile the decision below with *RTC v. FSLIC*, 25 F.3d 1493 (10th Cir. 1994). While acknowledging the Tenth Circuit's holding that a plaintiff's right to restitution is "not affected" by subsequent events, the government rehashes its argument that the Federal Circuit merely looked to subsequent events as a way of ascertaining the value of the benefit at the time it was conferred. Opp. 26. But this approach directly conflicts with the holding of the Tenth Circuit, which requires "an examination of the benefit conferred *at the time the investment was made*." 34 F.3d at 984 (emphasis added).

The government's suggestion that the "practical significance" of the circuit split is "limited" because all *Winstar* cases are currently being litigated in the Federal Circuit, Opp. 24-25, implicitly acknowledges its inability to reconcile the conflict. But the government is also mistaken as to the conflict's scope. The Ninth and Tenth Circuits properly applied the law of restitution as set forth in the *Restatement* and adopted in *Mobil*. The Federal Circuit, in contrast, did not, choosing instead to create its own rules governing contract claims against the government. The result is a conflict that spreads well beyond the context of *Winstar*-related cases and, just as in *Mobil*, demands this Court's review.

3. The courts below erroneously held that the transactional costs associated with raising capital are the sole measure of replacement cost damages. That conclusion conflicts with *Winstar*, which expressly recognized the economic value of goodwill, as well as with the Federal Circuit's ruling in *Bluebonnet Savings Bank, F.S.B. v. United States*, 266 F.3d 1348 (Fed. Cir. 2001).

The government claims that the ruling on replacement costs merely reflects the court's acceptance of the testimony of the government's expert, Professor Miller,

over CalFed's. Opp. 27-28. But the government does not dispute that another court, reviewing the *same* testimony from Professor Miller in another *Winstar* case, has now reached a different conclusion over the proper measure of replacement cost damages. *See LaSalle Talman Bank, F.S.B. v. United States*, 45 Fed. Cl. 64, 104-05 (1999) (holding that supervisory goodwill has economic value and concluding that Professor Miller's testimony "is not relevant" and "has no value as a tool for calculating damages for breach of contract"), *appeal pending*, No. 00-5027. Contrary to the government's suggestion that this is a "factual finding[ ]" that "does not warrant this Court's attention," Opp. 26, 28, the *measure* (as opposed to the *amount*) of damages is a question of law. *See Scully v. U.S. Wats, Inc.*, 238 F.3d 497, 507 (3d Cir. 2001). And given the large number of pending *Winstar*-related cases, this is a question that will recur often and thus merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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